

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

**JANIE BELLE CORN v. HHS and JAMES FARMER, DIRECTOR,
DIVISION OF WORKER'S COMPENSATION, TENNESSEE DEPT. OF
LABOR AND WORKFORCE DEVELOPMENT**

**Direct Appeal from the Circuit Court for Franklin County
No. 12827-CV Hon. Thomas W. Graham, Judge**

**No. M2004-02319-WC-R3-CV - Mailed - April 4, 2006
Filed - June 21, 2006**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225 (e) (3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Plaintiff has appealed the action of the trial court, which determined that the Plaintiff's cause of action is barred by the statute of limitations and by failure to provide notice timely in accordance with the law. Upon our consideration of all of the evidence, we find that the evidence preponderates in favor of the findings of the trial court, and we affirm.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Circuit Court is Affirmed.**

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM H. INMAN, SR. J., joined.

John Mark Stewart, Winchester, Tennessee, for the Appellant, Janie Belle Corn.

David W. Noblitt, Thomas O. Sippel, Leitner, Williams, Dooley & Napolitan, PLLC, Chattanooga, Tennessee, for the Appellee, HHS.

MEMORANDUM OPINION

The facts in this action show that Janie Belle Corn ("Employee") worked as a housekeeper at the hospital in Winchester, Tennessee, for some thirty-five years. The Employee worked for several employers at the hospital because the hospital changed ownership several times over the years.

In August, 2000, the hospital decided to outsource the housekeeping functions to HHS ("Employer"), and the Employee then worked for HHS for a period of some seven months before she voluntarily ceased working for the Employer in March 2001 and scheduled knee replacement surgery for April 2001.

The proof was undisputed that the Employee suffered a degenerative arthritic condition in her right knee during the time she worked at the hospital, but before she worked for HHS, the Employer. In 1996, she began experiencing problems which caused her to seek medical attention. She was diagnosed with degenerative tenderness in her knee. X-rays showed mild degenerative changes of the knee and a degenerative meniscal tear with a resulting Baker's cyst. Arthroscopic surgery was performed in April 1996. After the Employee was off for a period of recuperation, she returned to work. No claim was made under the workers' compensation law at that time.

The Employee continued to experience right knee problems, however. In January 1997, the Employee and her orthopedic surgeon discussed the fact that the Employee would require a knee replacement at some point in the future. Another arthroscopic procedure was performed in 1998. Again, the Employee missed time from work during surgery and recuperation. At that time the treating physician recommended total knee replacement, but acknowledged that such a decision must be made by the patient at the point in time when the pain becomes so great that the patient feels she has no alternative. The Employee deferred action until March of 2001, when she determined she would cease her employment. A surgical knee replacement was performed in April 2001.

On June 15, 2001 the Employee gave notice of a claim under the workers' compensation law. Suit was filed on September 27, 2001, seeking workers' compensation benefits for the Employee's right knee. After suit was filed, and more than a year after the Employee left work for the Employer, it was determined that the Employee also experienced a number of other physical problems which her doctor believed were occasioned by her work. She suffered gradual injuries to her back, her ankles, and her left knee. No issue was raised by the Plaintiff concerning the possible compensability of these other injuries until virtually time for trial. The medical proof shows that all of the injuries are gradual in nature. Despite the contested issue of causation with respect to these injuries, we believe the evidence demonstrates that the Employee's work aggravated all of the problems experienced by the Employee.

ANALYSIS

The trial court determined that the Employee's claims were time-barred. Such a decision contains both elements of law and fact. The issues of law should be determined only after a determination of the facts to be considered. Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Thus, we are required to conduct an independent examination of the record to determine the preponderance of the evidence.

With respect to the testimony of the Employee, the trial court had the opportunity to determine her credibility based upon her testimony in person before the court. When the trial court has observed the witnesses and heard their testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's findings. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When the medical proof is presented by deposition, we may determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility with respect to the expert proof. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Traveler's Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

The primary issues raised on appeal are whether the Employee may recover for any of her injuries under the Workers' Compensation Act because of her failure to report the injury to the Employer sooner and because of her failure to file suit more timely. The law requires the Employee to give prompt notice of the work-related injury. Tenn, Code Ann. § 50-6-201¹. Further, the law provides that suit must be filed within one year after the occurrence of a workers' compensation injury. Tenn, Code Ann. § 50-6-203². However, before we determine if the Employee gave timely notice of her injury to her right knee to the Employer, we must determine if the Employee suffered a new injury or an aggravation to a pre-existing condition. This determination is important to this case because the Employee has brought suit only against the Employer and not prior employers for whom she worked at the time she first sought medical attention and was diagnosed with degenerative tenderness in her right knee. See, *Mahoney v. Nationsbank of Tennessee, N.A.*, 158 S.W.3d 340, 346 (Tenn. 2005)³.

Further, because the suit herein was filed only against the Employee's most recent employer, we must consider the proof concerning an injury or aggravation from the day the Employee first

¹The provisions of Tennessee Code Annotated section 50-6-201 require that notice of a "gradual or cumulative" injury must be provided within thirty days after the employee knows or reasonably should know of her injury which resulted in permanent impairment or within thirty days after the employee is unable to "continue to perform such employee's normal work activities"

²The provisions of Tennessee Code Annotated section 50-6-203 were significantly changed by the legislature in 2004. The one-year statute of limitations for workers' compensation injuries is now at section 50-6-203(g)(2)(i). Previously, and during the time applicable to the suit at bar, the one-year statute of limitations was at section 50-6-203(a).

³*Mahoney v. Nationsbank of Tennessee, N.A.*, 158 S.W.3d 340, 346 (Tenn. 2005) established that though one entity is bought by another and as consequence a worker continues to perform the same duties at the same location, but for a different employer, he must consider the employers to be separate and distinct. Here, because suit was not filed until more than one year after she ceased to be employed by the hospital, the Employee could not look to the hospital for any recovery.

became employed by HHS, contrasted with events prior to that date. Though the Employee continued to perform the same duties at the same location, the fact that she ceased to be employed by the hospital itself prevented her from recovering from her former employer. *See, id.*

After making a determination as to whether the Plaintiff sustained a new injury while employed by the current employer, we must also examine the law to determine when the statute of limitations begins to run upon a claim for a gradual injury. Gradual injuries are those that occur without the occurrence of a traumatic event, but rather develop over time. *Conroy v. Carter Automotive Products Corp.*, 540 S.W.2d 831, 832-33 (Tenn. 1982); *Brown Shoe Co. v. Reed*, 350 S.W.2d 65, 69 (Tenn. 1961).

The Employee alleges that she suffered an aggravation of a pre-existing condition or a new injury and that her suit was filed timely and that notice was timely given. We must then consider the facts to determine whether the Employee suffered a new injury while under the employ of the current Employer which led to her knee replacement in 2001, or whether the treatment in 2001 was simply a continuation of the treatment required for the same knee injury which manifested itself five years or more previously. In making this determination, we have considered the medical proof and the lay testimony by the standards which we discussed above. The Employee testified that she suffered from increased pain, so much so that she decided to discontinue her employment due to the increase in pain. Increase in pain alone, however, is not sufficient to constitute a new injury or a compensable aggravation of a pre-existing condition. *Townsend v. State*, 826 S.W.2d 434, 436 (Tenn. 1992). The employee's work for the employer must cause an actual progression or aggravation of the pre-existing condition in order for employer to be liable. *Id*

After careful consideration of the evidence, we find that the facts show that the knee replacement surgery in 2001 was merely a continuation of the treatment the Employee began receiving five years before. It is undisputed that the Employee first sought medical attention for her knee at least in 1996 and possibly from her primary care physician before that time. Further, she missed work because of her knee problems at least as early as 1996 when her first surgery occurred. In early 1997, shortly after her surgery, the treating physician told the Employee that ultimately she would require a knee replacement. Regular treatment appointments continued for the gradually occurring injury, consisting of what the treating physician termed "intermittently every few months." Another surgical procedure occurred in 1998. Again, there was no notice of any new injury or any traumatic event. After the second surgery in 1998, there was no evidence of any traumatic injury and no medical evidence of any anatomical advancement of the Employee's underlying condition. Instead, the Employee waited until she was ready for the knee replacement surgery to be performed. The evidence may show that the Employee began to suffer increased pain, and it was for that reason that she left her employment and scheduled the knee replacement surgery. Thus, there is no evidence which we find that is indicative of a new injury. The proof shows that the Employee continued to require the same or similar treatment over a period of years for her old injury.

We find that the preponderance of the evidence shows that the Employee suffered a gradually occurring injury which first manifested itself in 1996. The evidence shows that the Employee never

recovered, but that her problem continued. There was no showing of any new anatomical change that would give rise to a claim of a new and different injury. Because the Employee suffered a gradual injury which first manifested itself in 1996 and required a surgical procedure in that year, we find that the law required the Employee to give notice to her employer at that time and to file suit within one year thereafter. The facts show that the Employee knew of the permanency of her problem. We find that the Employee knew, or at least should have known, that her duties at the hospital aggravated her injury in 1996. However, the Employee did not file a workers' compensation claim at that time. The law has firmly established that the statute of limitations for worker's compensation injuries begins when the employee misses her first day of work because of a gradual injury. *E.g., Bone v. Saturn Corp.*, 148 S.W.3d 69, 72 (Tenn. 2004)⁴; *Lawson v. Lear Seating, Corp.*, 944 S.W.2d 340, 342-343 (Tenn. 1997); *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 375-376 (Tenn. 1991). The Employee first missed work for her gradual injury in 1996 when she had arthroscopic surgery performed on her right knee. The one-year statute of limitations began to run at that point, and it was then that she should have given notice of her injury to her employer.

Similarly, the statute of limitations also ran on the Employee's complaints of other injuries to her back, her left knee, and her ankles. The evidence shows that the employee knew of these problems at the time she filed suit, yet no notice of these injuries was given for more than a year and no amendment of her complaint was sought until at or near the date of trial. An employee has a duty to provide notice to her employer that she has sustained an injury which she believes to be work-related. Tenn. Code Ann. § 50-6-201. The Employee is not required, however, to give notice of the portions of his anatomy which were injured or the treatment which he may feel is necessary. *Quaker Oats Co. v. Smith*, 574 S.W.2d 45, 48 (Tenn. 1978). Once notice is provided, further, other, or continued notice to the employer is not necessary, even where subsequent procedures are required which were not originally contemplated at the time of the injury. *Ware v. Illinois Cent. Ry. Co.*, 281 S.W. 927 (Tenn. 1926). At the same time, however, notice of a right knee injury is not sufficient to place an employer on notice of a left knee injury, bi-lateral ankle injuries, or a back injury.

We have recognized that the workers' compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation] Act of securing benefits to those workers who fall within its coverage." *Martin v. Lear Corp.*, 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of his cause of action rests upon the employee. *Cutler-Hammer v. Crabtree*, 54 S.W.3d 748, 755 (Tenn. 2001). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn.

⁴*Bone v. Saturn Corp.*, 148 S.W.3d 69, 72- 73 (Tenn. 2004), provides that the "last day worked rule" is inapplicable to the determination of the employee's compensation rate where the employee previously gave notice of a gradually occurring injury prior to missing time from work. There is no evidence that the Employee in the present case gave any notice to her employer. *Bone* recognizes that the "last day worked rule" continues to control the commencement of the statute of limitations for gradually occurring worker's compensation actions in Tennessee and in a majority of other jurisdictions. *Id.* at 72-73.

2004); *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Applying these rules which are favorable to the Employee, we nonetheless reach the conclusion that her injury occurred in 1996 and later medical treatment was all occasioned by that injury.

CONCLUSION

Thus we affirm the decision of the trial court in all respects, concluding that the Employee is barred from receiving compensation under the Worker's Compensation law because of her failure to file suit within the statute of limitations and her failure to provide timely notice of her injuries.

The costs on appeal will be taxed against the Employee. The Plaintiff's complaint is dismissed.

ROBERT E. CORLEW, SPECIAL JUDGE

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**Circuit Court for Franklin County
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ORDER

This case is before the Court upon the motion for review filed by Janie Belle Corn pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Janie Belle Corn, for which execution may issue if necessary.

PER CURIAM

Clark, J. - Not Participating

